

No. 88-296

Supreme Court, U.S.

FILED

OCT 19 1988

JOSEPH E. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

WALTER J. SHOSTAK, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

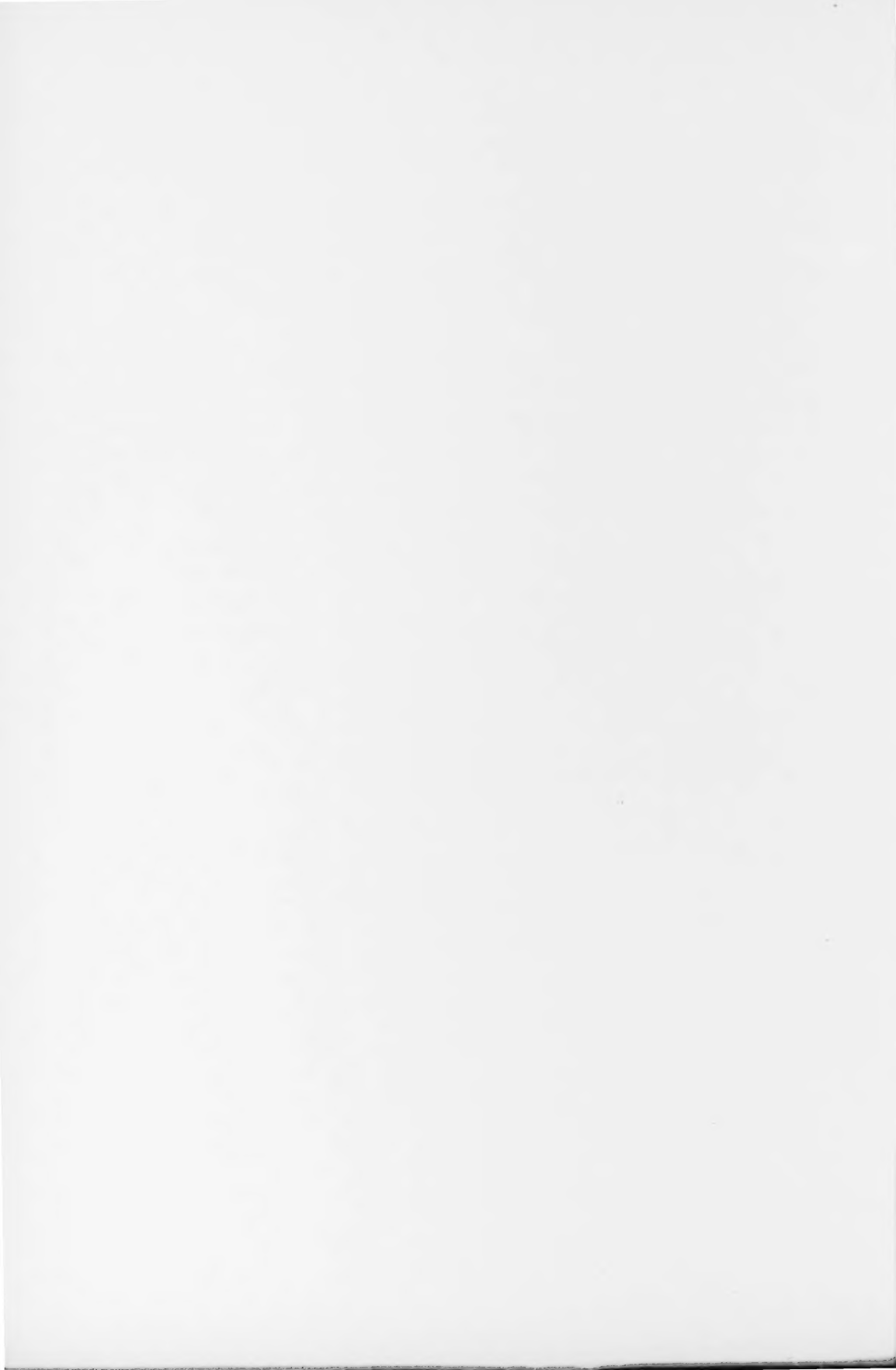
CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 553-2217

CATHERINE C. COOK
General Counsel
Federal Energy Regulatory Commission
Washington, D.C. 20426

7 PP

TABLE OF AUTHORITIES

Cases:	Page
<i>Escondido Mut. Water Co. v. LaJolla Band of Mission Indians</i> , 466 U.S. 765 (1984)	5
<i>First Iowa Hydro-Electric Coop. v. FPC</i> , 328 U.S. 152 (1946)	5
Statute and regulation:	
Federal Power Act, 16 U.S.C 791a <i>et seq.</i>	1
§ 4, 16 U.S.C. (& Supp. IV) 797 (e)	1
§ 4, 16 U.S.C. (& Supp. IV) 797 (f)	2, 4
§ 21, 16 U.S.C. 814	5
18 C.F.R.:	
Section 385.214 (a) (3)	2
Section 385.214 (c) (1)	2
Section 385.214 (d)	2



In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-296

WALTER J. SHOSTAK, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the Federal Energy Regulatory Commission (FERC) violated the Federal Power Act, 16 U.S.C. 791a *et seq.*, and its regulations, by dismissing petitioner's untimely motion to intervene in a FERC hydroelectric licensing proceeding and by denying his appeal of FERC's order granting a license in that proceeding.

1. Under the Federal Power Act, an individual must obtain a license from FERC to construct and operate a nonfederal hydroelectric project located either on public lands or in any "bodies of water over which Congress has jurisdiction" under the Commerce Clause (16 U.S.C. (& Supp. IV) 797(e)).

Upon receipt of an application for a license or a preliminary permit for a license, FERC publishes a notice of the proposed project in a local newspaper (16 U.S.C. 797(f)). An interested individual may file a timely "motion to intervene" (18 C.F.R. 385.214 (a)(3)); and, absent an objection to the intervention motion, the movant automatically becomes a "party" to FERC's proceeding (18 C.F.R. 385.214(c)(1)). FERC may in its discretion grant an untimely motion to intervene if the movant demonstrates that his failure to file a timely motion is supported by "good cause" and that intervention will neither disrupt the proceedings nor prejudice other parties (18 C.F.R. 385.214(d)).

This case involves two competing applications to FERC for the development of a hydropower project on the same site on the Schroon River in upstate New York (Pet. App. B1). In November 1984, Schroon River Associates filed an application for a preliminary permit to study the feasibility of developing a project at the site. In March 1985, Adirondack Hydro Development filed a license application for the construction of a project at the same site. *Ibid.* FERC published a notice of the Schroon River Associates' application in a local newspaper on April 15, 1985, setting May 31, 1985, as the final date to intervene in the proceeding (*id.* at B2 n.1). FERC subsequently published notice of Adirondack Hydro Development's application in a different local newspaper on July 29 and again on August 5, 12, and 19, 1986, setting September 18, 1986, as the final date to intervene in the proceeding (*ibid.*).

Petitioner, a property owner at the project site, filed two motions to intervene in the proceedings. He filed a timely motion dated May 24, 1985, to inter-

vene in the Schroon River Associates proceeding (Pet. App. D1-D5) and, on February 3, 1987, he filed an untimely motion to intervene in the Adirondack Hydro Development proceeding (*id.* at B3 & n.3). In both motions, petitioner asserted that the proposed project might affect his rights under the terms of an 1895 water-rights deed (see *id.* at D2-D3).

On January 30, 1987, prior to petitioner's filing of his second intervention motion, the Director of FERC's Office of Hydropower Licensing issued an order in both proceedings granting Adirondack Hydro Development's license application and, at the same time, denying Schroon River Associates' competing permit application (Pet. App. B2-B3). Petitioner appealed this order to the Commission on March 23, 1987, arguing that Adirondack should not be granted a license (*id.* at B3).

FERC denied petitioner's motion to intervene in the Adirondack Hydro Development proceeding on the ground that its motion was untimely and, for that reason, also denied his appeal from the order granting a license to Adirondack Hydro Development (Pet. App. B2-B9). FERC explained that because petitioner's motion to intervene in the Adirondack Hydro Development proceeding was untimely, he never became a party to that proceeding and therefore could not appeal the Director's order granting Adirondack Hydro Development a license (*ibid.*).

The court of appeals affirmed (Pet. App. A1-A4). The court concluded that FERC "followed the proper procedures in publishing notice of the licensing proceeding, and * * * properly denied Shostak's untimely motion to intervene" (*id.* at A2). In particular, the court rejected petitioner's contention that "the notice provided by FERC was improper because it was not

published in the newspaper closest to the proposed project site" (*ibid.*).

2. Petitioner claims (Pet. 6-7) that because he filed a timely motion on May 24, 1985, to intervene in the Schroon River Associates proceeding before FERC and sent a copy of that motion to Adirondack Hydro Development (which had filed its license application on March 29, 1985), he should be deemed to have filed a timely motion to intervene in the Adirondack Hydro Development proceeding as well. The May 24, 1985, intervention motion, however, does not fairly admit of that construction. It clearly indicates that petitioner sought to intervene only in the Schroon River Associates proceeding (see Pet. App. D1). As the court of appeals explained (*id.* at A2-A3), moreover, FERC adequately notified the public, including petitioner, of the discrete Adirondack Hydro Development proceeding. As required by statute, FERC published notice of that proceeding in a newspaper located within the same county as the project (see *id.* at A3 (citing 16 U.S.C. 797(f)); Pet. App. B2 n.1). The court of appeals therefore correctly concluded that FERC properly rejected petitioner's challenge to the issuance of the license to Adirondack Hydro Development on the ground that petitioner lacked standing as a "party" to challenge the Commission's licensing action (*id.* at A3).

In any event, further review is not warranted because FERC's disposition of this case does not unduly prejudice petitioner's ability to protect his interests. The only reason petitioner asserts (Pet. 3-4) as to why he should be allowed to intervene in the proceedings before FERC is to vindicate certain water-rights claims grounded in state law. However, it is clear that FERC lacks jurisdiction to adjudicate such

water-rights claims. See *Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765, 782 (1984); *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 176-177 & n.20 (1946). As the court of appeals noted (Pet. App. A4), Section 21 of the Federal Power Act, 16 U.S.C. 814, requires that any FERC licensee that needs to acquire private property rights for a project must initiate a condemnation proceeding for that purpose in federal district court. Hence, such a condemnation proceeding will be necessary—and will provide an appropriate occasion to vindicate petitioner's asserted interest—if, as petitioner suggests, Adirondack Hydro Development's project requires the taking of his water rights.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

CATHERINE C. COOK
General Counsel
Federal Energy Regulatory Commission

OCTOBER 1988